

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

October 27, 2006

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Ref No.: GLS-5619

HAWAII

Amend Prior Board Action of June 23, 2006, Item D-1, Amend General Lease No. S-5619, Natural Energy Laboratory of Hawaii Authority, Covering Portions of Government Lands at Hamanamana, Kalaoa 1st- 4th and Ooma 1st-2nd, North Kona, Hawaii, Tax Map Key: 3rd/7-3-09: and 7-3-43

BACKGROUND:

Pursuant to Act 103, Session Laws of Hawaii 2002, as approved by the Governor on May 31, 2002, relating to Chapter 171-36, Hawaii Revised Statutes, the Board of Land and Natural Resources was authorized to waive its requirement to obtain prior approval for consents to its subleases for good cause.

At its meeting of June 23, 2006, Agenda Item D-1, the Board approved the amendment of General Lease No. S-5619, to waive its lease requirements to obtain prior approvals from the Board of Land and Natural Resources for consent to its subleases. (EXHIBIT A) Purpose of amending the lease was to enable NELHA to process its subleases without prior consents from DLNR, in attempts to expedite and streamline the processing of NELHA's subleases by eliminating duplicated work performed between the respective NELHA and DLNR board, deputy attorney general office, and staff. It further was also an attempt to legalize the various after-the-fact subleases activated by NELHA since June 22, 2001. The waiver for a need to acquire DLNR consents would in turn eliminate a need for further processing and preparation of individual DLNR consents for those subleases that might no longer be active or no longer utilizing the NELHA facility.

In preparing the amendment document, the Office of the Attorney General determined that the various consents to sublease predating the effective date of Act 103 (5/31/02) could not be waived retroactively to the stated July 3, 2001 date. That it would be more appropriate to approve consents of the various after-the-fact subleases retroactively to May 31, 2002. As a result, only those subleases executed between June 23, 2001 and March 31, 2002, and are still active or remain on the NELHA property would still require a consent to sublease document.

RECOMMENDATION:

That the Board Amend Its Prior Board Action of June 23, 2006, Agenda Item D-1, by amending recommendation action "A", by changing the proposed retroactive date from July 3, 2001 to May 31, 2002;

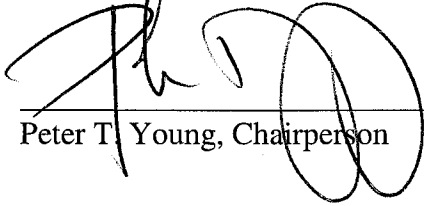
Respectfully submitted,



Wesley T. Matsunaga
Land Agent



APPROVED FOR SUBMITTAL:



Peter T. Young, Chairperson

AMENDED

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
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Amend General Lease No. S-5619, Natural Energy Laboratory of Hawaii Authority, Covering Portions of Government Lands at Hamanamana, Kalaoa 1st-4th, and Ooma 1st & 2nd, North Kona, Hawaii, Tax Map Key: 3rd/7-3-09: and 7-3-43:

LEGAL REFERENCE:

Section 171-6, 171-7, 171-16, 171-59 and other applicable sections of Chapter 171, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Hamanamana, Kalaoa 1st-4th, and Ooma 1st & 2nd, North Kona, Hawaii, identified by Tax Map Key: 3rd/7-3-09: and 7-3-43:, as shown on the attached map labeled Exhibit A.

AREA:

869.341 acres, more or less

ZONING:

State Land Use District: Conservation/ Urban
County of Hawaii CZO: Open/ MG/ ML

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

as Amended
APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES *an*
AT ITS MEETING HELD ON
June 23, 2006

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CURRENT USE STATUS:

Encumbered under General Lease No. S-5619, to the Natural Energy Laboratory of Hawaii Authority (NELHA)

LEASE CHARACTER OF USE:

To develop, maintain, and operate an ocean-related high technology industrial park in accordance with Chapter 227D and Chapter 206M, Hawaii Revised Statutes, and to allow for ancillary and accessory uses that will assist the development to become self-sufficient.

LEASE TERM:

45 years, commencing on July 3, 2001 and expiring on July 2, 2046. First rental reopening is scheduled for July 3, 2011.

ANNUAL RENT:

Annual rental shall be fifty percent (50%) of the net operating income (NOI). NOI is the actual net income remaining after all adjusted operating expenses are deducted from the effective gross income including a reserve for replacement and for major repairs not covered in the operating budget. This does not include federal funds and grants.

RENTAL REOPENINGS:

The annual lease rental reserved shall be reopened and re-determined as of the day following the expiration of every tenth year of the term.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

The proposed use does not differ from the past use of the subject area. Therefore, pursuant to Section 11-200-8(1), Exempt Classes of Action, of the Environmental Impact Statement Rules, the action is exempt from the preparation of an environmental assessment. Accordingly, it is recommended that the Board declare the proposed use exempt from obtaining a negative declaration.

BACKGROUND:

At its meeting of November 19, 1999, the Board of Land and Natural Resources, under Agenda Item D-20, approved as amended, the cancellation of General Lease No. S-4717 and S-5157; Cancellation of Governor's Executive Order No. 3282; and Direct Issuance of a "new" General Lease No. S-5619 to the NELHA. Purpose was to consolidate the parcels previously encumbered under Executive Order No. 3282, General Leases No. S-

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4717 and S-5157 into one lease, to simplify the lease and sublease processes for NELHA. Its intent was to give NELHA the flexibility to develop, maintain, and operate an ocean related high technology industrial park in accordance with Chapter 206M, and/or Chapter 227D, Hawaii Revised Statutes. This would allow NELHA to provide ancillary and accessory uses that will assist in its development to become self-sufficient. The recommendation also included authorizations for NELHA to approve its subleases in attempts to eliminate the huge backlog for sublease approvals. However, the Office of the Attorney General advised that Section 171-6(8), Hawaii Revised Statutes, as amended, does not allow the Board of Land and Natural Resources to delegate its powers to anybody other than its Chairperson or employee of the Department of Land and Natural Resources.

At its meeting of June 22, 2001, Agenda Item D-18, the Board approved to amend its prior Board Actions of November 19, 1999 (Item D-20) to delegate to the Chairperson its authority to consent to various subleases for the use of NELHA facilities. The Board action included a blanket approval of about thirty-nine after-the-fact consents to subleases.

Pursuant to Act 261, Session Laws of Hawaii 2000, as amended, relating to Chapter 171-36, Hawaii Revised Statutes, the Board of Land and Natural Resources is now authorized to waive requirements to obtain consents to subleases under public land leases for good cause.

By letter dated November 1, 2005, Richard Henderson, Chairperson of the NELHA Board of Directors requested a waiver of a condition contained in General Lease No. S-5619, concerning its requirement to obtain prior approvals from the Board of Land and Natural Resources (BLNR) for consents to negotiate its subleases. A waiver of the DLNR consent to sublease would alleviate what appear to be duplicated and unnecessary steps in routine sublease processing intended to protect the State's interest. At present, much of the work reviewed and processed by DLNR, Land Division and its respectively assigned deputy attorney general (AG) are in essence, duplicating work processed by NELHA and its deputy AG. In principle, since NELHA is an instrumentality and agency of the State, it too is mandated to act on behalf of and in the interest of the State. Therefore, it would be unnecessary to also have the BLNR, its staff and assigned AG to further review and approve the same sublease documents prior to further processing. Waiving NELHA's lease requirement to obtain prior approval from the BLNR or its authorized representative would greatly streamline the time and efforts required by all agencies involved in the processing of those subleases. NELHA's ability to process its sublease documents in a timely manner is critical to each tenant's development plans and financing. Currently, the sublease process for one sublease document takes approximately three to four months to complete, assuming all goes well.

Staff is of the belief that it is for good cause that NELHA's requirements to obtain DLNR consent for its subleases be waived in attempts to eliminate the duplicated work performed between the two agencies to streamline the processing of NELHA subleases.

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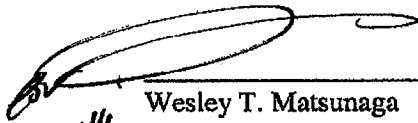
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That the waiver of DLNR consent to sublease be retroactive to July 3, 2001, the effective date of General Lease No. S-5619. This would eliminate a need to further process those short termed (1-year) subleases, which have since expired and are no longer in operation or on NELHA property. That NELHA could handle such matters internally.

RECOMMENDATION: That the Board:

- A. Authorize the prior consent of various subleases under General Lease No. S-5619 by NELHA to its users, retroactively to July 3, 2001, subject to review and approval by the Department of the Attorney General;
- B. Amend Condition 12, page 4, of General Lease No. S-5619, by waiving its lease requirement to obtain prior approvals for consents to its subleases from the Board of Land and Natural Resources, its Chairperson, and/or authorized representatives.
- C. That the NELHA Board and/or its authorized representative shall be responsible to review and approve such subleases to protect the interest of the State, and subject to further review and approval by the Department of the Attorney General. The subleases might include one of the following variations:
 - 1) Facility Use Agreements (FUAs): terms of one year or less
 - 2) FUA Supplemental Agreements
 - 3) Facility Rental Agreements (FRAs): terms of one year or less
 - 4) FRA Supplemental Agreements
 - 5) Subleases: terms of one year to 30-years
 - 6) Sublease Supplemental Agreements
- C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Wesley T. Matsunaga
Land Agent

APPROVED FOR SUBMITTAL:



Peter T. Young, Chairperson

Approved As Amended. Staff's Submittal was amended in the Recommendation section, by changing the last recommended action to "D." and adding a new recommended action "E." to read, "That the Land Board expresses its support of the NELHA Board's efforts to establish land use rents and water charges at fair market value."

EXHIBIT A

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